

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BPI ENERGY, INC., et al.,)
Plaintiffs,)
V.) Civil No. **07-186-DRH**
IEC (MONTGOMERY), LLC, et al.,)
Defendants.)

ORDER

PROUD, Magistrate Judge:

Before the Court is the defendants' motion to compel plaintiff to produce certain documents. (**Doc. 145**). The subject motion was filed in October 2008, just before the case was stayed. The stay was lifted on April 14, 2009, but no response has ever been filed by plaintiff. Although scheduling issues remain to be resolved, the Court does not perceive any reason why the subject motion cannot now be addressed. Plaintiff's failure to respond to the motion is construed as an admission of the merits of the motion.

Insofar as the defendants seek the materials relied upon by plaintiff's experts in compiling rebuttal reports, defendants correctly note that plaintiff is obligated under Federal Rule of Civil Procedure 26(a)(2) to produce such materials.

The defendants also seek materials they perceive have been improperly withheld in response to their requests for production: (1) certain Board minutes and materials; (2) communications between BPI and Tristone Capital (U.S.A.), Inc.; and (3) a non-binding letter of intent between BHP Billiton and BPI. If the materials identified by the defendants do exist and are in plaintiff's custody or control, those materials must be produced. In the event the requested materials do not exist or are not in plaintiff's custody or control, plaintiff must so inform the

defendants in writing.

IT IS THEREFORE ORDERED that the defendants' motion to compel (**Doc. 145**) is **GRANTED** in all respects.

IT IS SO ORDERED.

DATED: May 4, 2009

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE